

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**R.J., Appellant**

**and**

**DEPARTMENT OF DEFENSE, TYNDALL  
AIR FORCE BASE, FL, Employer**

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**Docket No. 09-1202  
Issued: December 1, 2009**

*Appearances:*

*Jeffrey P. Zeelander, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

DAVID S. GERSON, Judge  
COLLEEN DUFFY KIKO, Judge  
JAMES A. HAYNES, Alternate Judge

**JURISDICTION**

On April 3, 2009 appellant filed a timely appeal from a March 24, 2009 decision of the Office of Workers' Compensation Programs adjudicating his schedule award claim. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

**ISSUE**

The issue is whether appellant has more than three percent impairment to his right upper extremity.

**FACTUAL HISTORY**

On August 31, 2006 appellant, then a 56-year-old toolmaker, filed a claim for a traumatic injury on August 14, 2006 when a ratchet broke causing his right elbow to slam into grating. The Office accepted his claim for a fractured right elbow and olecranon bursitis. On August 30, 2007 appellant underwent a right olecranon bursectomy and exostectomy. On February 26, 2009 appellant filed a claim for a schedule award.

In a report dated December 19, 2007, Dr. Mark J. Tenholder, an attending Board-certified orthopedic surgeon, provided findings on physical examination and opined that appellant had reached maximum medical improvement. He stated that appellant could return to full duty and had zero percent impairment of his right upper extremity based on a state impairment guide.

In a November 7, 2008 report, Dr. Robert B. Dehgan, a Board-certified physiatrist, reviewed appellant's medical history and provided findings on physical examination. There was no redness, swelling or deformity of the right elbow. Angle of the elbow, medial and lateral ligaments was stable. Range of motion of the right elbow was 125 degrees of flexion, 10 degrees of extension and 80 degrees of pronation and supination. In an addendum report dated February 4, 2009, Dr. Dehgan stated that appellant had 50 percent impairment of the upper extremity for a disorder of the ulnohumeral joint, based on Table 16-18 at page 499 of the fifth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (the A.M.A., *Guides*) and section 16.7 (Impairment of the Upper Extremities Due to Other Disorders). However, in the impairment worksheet portion of his report, he indicated that appellant had no impairment due to this section in the A.M.A., *Guides* regarding other disorders. In the worksheet, Dr. Dehgan determined that appellant had 20 percent elbow impairment due to decreased range of motion, including 15 percent for 125 degrees of flexion and 5 percent for 10 degrees of extension. He determined that appellant had 10 percent upper extremity impairment that converted to 6 percent whole person impairment based on Table 16-3 (Conversion of Impairment of the Upper Extremity to Impairment of the Whole Person), line 11, at page 439 of the fifth edition of the A.M.A., *Guides*. On appeal appellant requests that the Board modify the Office's schedule award decision to reflect Dr. Dehgan's impairment rating.

On March 18, 2009 an Office medical adviser stated that appellant had three percent right upper extremity impairment based on decreased elbow range of motion and Table 16-34 at page 472 of the A.M.A., *Guides* (two percent for 125 degrees of flexion<sup>1</sup> and one percent for 10 degrees of extension).<sup>2</sup>

By decision dated March 24, 2009, the Office granted appellant a schedule award based on three percent right upper extremity for 9.36 weeks, from November 7, 2008 to January 11, 2009.<sup>3</sup>

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<sup>1</sup> Table 16-34 provides two percent impairment for 120 degrees of flexion and one percent for 130 degrees. The Office medical adviser applied the higher of the two percentages.

<sup>2</sup> See Federal (FECA) Procedural Manual, Part 2 -- Claims, *Schedule Award and Permanent Disability Claims*, Chapter 2.808.6(d) (August 2002) (after obtaining all necessary medical evidence, the file should be routed to an Office medical adviser for an opinion concerning the nature and percentage of impairment in accordance with the A.M.A., *Guides*, with the medical adviser providing rationale for the percentage of impairment specified, especially when there is more than one evaluation of the impairment present).

<sup>3</sup> The Act provides for 312 weeks of compensation for 100 percent loss or loss of use of the upper extremity. 5 U.S.C. § 8107(c)(10). Multiplying 312 weeks by 3 percent equals 9.36 weeks of compensation.

### **LEGAL PRECEDENT**

The schedule award provision of the Federal Employees' Compensation Act<sup>4</sup> and its implementing regulations<sup>5</sup> set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.<sup>6</sup>

### **ANALYSIS**

Dr. Dehgan reviewed appellant's medical history and provided findings on physical examination. There was no redness, swelling or deformity of the right elbow. Angle of the elbow, medial and lateral ligaments was stable. Range of motion of the right elbow was 125 degrees of flexion, 10 degrees of extension and 80 degrees of pronation and supination. Dr. Dehgan stated that appellant had 50 percent impairment of the upper extremity for a disorder of the ulnohumeral joint, based on Table 16-18 at page 499 of the fifth edition of the A.M.A., *Guides* in section 16.7 (Impairment of the Upper Extremities Due to Other Disorders). In the impairment worksheet portion of his report, however, he indicated that appellant had no impairment based on this section of the A.M.A., *Guides*. Consequently, there is a conflicting determination in Dr. Dehgan's report regarding impairment due to a disorder of the ulnohumeral joint under the section on impairment due to other disorders. In the worksheet, Dr. Dehgan determined that appellant had 20 percent elbow impairment due to decreased range of motion, including 15 percent for 125 degrees of flexion and 5 percent for 10 degrees of extension. However, Table 16-34 at page 472 of the A.M.A., *Guides* provides between one and two percent for 125 degrees of flexion<sup>7</sup> and one percent for 10 degrees of extension. Therefore, Dr. Dehgan's rating of appellant's impairment due to decreased range of motion is incorrect. He further determined that appellant had 10 percent upper extremity impairment that converted to 6 percent whole person impairment based on Table 16-3 at page 439 of the fifth edition of the A.M.A., *Guides*. It is unclear how Dr. Dehgan determined the 10 percent upper extremity impairment in his worksheet which he applied to Table 16-3 at page 439. In any event, neither the Act nor the implementing regulations provide for a schedule award for the body as a whole.<sup>8</sup> Due to these deficiencies, Dr. Dehgan's report does not establish that appellant has more than three percent right upper extremity impairment.

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<sup>4</sup> 5 U.S.C. § 8107.

<sup>5</sup> 20 C.F.R. § 10.404.

<sup>6</sup> *Id.* at § 10.404.

<sup>7</sup> As noted, the Office medical adviser applied the higher of the two percentages.

<sup>8</sup> See *Guiseppe Aversa*, 55 ECAB 164, 167 (2003).

**CONCLUSION**

The Board finds that appellant has no more than three percent right upper extremity impairment for which he received a schedule award.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated March 24, 2009 is affirmed.

Issued: December 1, 2009  
Washington, DC

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board